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Ben McFarlane, The Structure of Property Law

Citation for published version:

Carr, D 2010, 'Ben McFarlane, *The Structure of Property Law*', *Edinburgh Law Review*, vol. 14, no. 2, pp. 342-43. <https://doi.org/10.3366/elr.2010.0017>

Digital Object Identifier (DOI):

[10.3366/elr.2010.0017](https://doi.org/10.3366/elr.2010.0017)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

Published In:

Edinburgh Law Review

Publisher Rights Statement:

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EdinLR Vol 14 pp 342-343
DOI: 10.3366/E1364980910001526

Ben McFarlane, THE STRUCTURE OF PROPERTY LAW

Oxford: Hart (www.hartpub.co.uk), 2008. xliii + 955 pp. ISBN 9781841135595. £28.

By penning a work entitled *The Structure of Property Law*, Ben McFarlane has approached his subject in a way which is in some respects groundbreaking for English law. It is a rare, though not unique, text that speaks of *property law*, let alone the *structure* of so elusive a concept. The reader is not disappointed upon moving beyond the title page into the body of the book, where an integrated account of the way in which high property theory *might* be distilled and applied in English private law can be found. The text is also distinguished by its use of comparative materials from both the Common and Civil Law traditions. It is a text which touches upon profound conceptual questions with international perspectives and systemic solutions to those questions. It is then no surprise that the text was short-listed for the Peter Birks Prize for Outstanding Legal Scholarship in 2009.

The start of the substantive text highlights the central concern of the work: “rights to use things”. This central enquiry is expanded to a dual concern, namely “(i) *who* is entitled to use a thing?; and (ii) *how* are they entitled to use it?” These may seem rudimentary points in a work on property law; however, the strength of this work for the student reader, and indeed others less familiar with the field, is its basic explanatory function in the context of English property law. This explanatory concern is manifested in the profusion of examples and diagrams in the text, and augmented by a companion micro-site (www.hartpub.co.uk/companion/propertylaw.html). The micro-site carries supplementary materials, and gives important updating information regarding decided cases. With regard to the diagrams and examples, the response to so many such devices is essentially a matter of stylistic taste, though this reviewer wondered if there were perhaps slightly too many cross-references for the reader’s ease.

The arrangement of this substantial text is split into three parts. After an introduction on the subject of “Basic concepts”, the two subsequent parts, on “Applying the basic structure” and “Specific rights”, are subdivided into a “General part” and a section dealing with “Land”. Such a structure betrays the traditional separateness accorded to treatments of land law, though McFarlane seeks to explain why this is so. There is not sufficient space to consider all areas of a one-thousand page textbook, but a number of points deserve special mention.

At its broadest the text provides the reader with a “basic structure” which represents a theoretical approach to all property law questions: (1) the “content question” (2) the “acquisition question” (3) the “defences question” (4) the “remedies question”. The “content question” is concerned with the identification of a right as either a property right properly so called or as a “persistent right”. The term “persistent right” is coined by McFarlane to replace “equitable property rights”; this new vocabulary is said to be more accurate, reflecting the fact that equitable property rights are not property rights at all (see further below), though they are rights which a third party might exercise against another (and so are “persistent”). The answer to the initial content question is then supplemented by the second enquiry, notably has an individual actually acquired such a right? If the individual has acquired either type of right then there may be defences to the enforcement of such a right against others, and the availability and number of those defences will depend on the classification as either a property or persistent right. Finally, if there is a subsisting property or persistent right, which is prestatable

against another in the absence of a valid defence, then a remedy will be available depending on whether the subject of the dispute is land or not. In setting out such a simple and easy-to-follow structure, the text once more demonstrates its usefulness in distilling a large and complicated subject into a student-friendly format.

At a theoretical level the text argues that incorporeal property cannot be a thing, and that things are “objects that can be physically located in a particular place”. In turn, this prompts the author to reject a fundamental orthodoxy of English approaches to property law—the distinction between “legal property rights” and “equitable property rights”. This rejection rests upon an elegantly simple argument: because property law is concerned with rights in things, or at least against things, equitable property rights are not property rights at all because they do not attach to a thing but rather attach or flow from the rights of another. The term preferred by McFarlane is “persistent rights” which are derived from the rights of another—“rights against a right”. The category “persistent rights” is a novel construct that emphasises that a specific right held by A might be the subject of a right held by B, and that B’s right against the right held by A can survive a transfer of A’s right to C. Therefore, the fundamental conceptual difference between a property right and a persistent right is the subject matter of the right. One may observe that this approach owes much to a unitary conceptualisation of property law insofar as it seeks to move away from distinguishing such rights on the basis of their origin: i.e. does the right arise at common law or in equity? This approach makes the text’s broader treatment of equity and persistent rights as controversial as it is novel.

Although the text is not explicitly dedicated to a student audience, it is clear that students would benefit from an acquaintance with this book. Likewise, there is much here that would be of assistance to academic study in Scotland. A student of Scots law would benefit particularly from the systemic contextualisation which the book provides, insofar as it talks in a language and theoretical setting which would be recognisable. On the other hand, it is less clear to what extent the text will prove useful to a practitioner beyond being interesting reading material: the text is, no doubt deliberately, a provocative challenge to the orthodoxy of English property law. This conceptual challenge renders the text of interest to academics, useful to students, and perhaps a little unreliable for a practitioner seeking an authoritative answer for English law. In many ways the text is indicative of how a Scottish lawyer might have written a book about English property law. What is less clear is how many English lawyers will recognise the English law that the text purports to portray.

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EdinLR Vol 14 pp 343-345

DOI: 10.3366/E1364980910001538

A J van der Walt, PROPERTY IN THE MARGINS

Oxford: Hart Publishing (www.hartpub.co.uk), 2009. xxix + 272 pp. ISBN 9781841139630. £35.

This searching, theoretical, but rule-based text proceeds from the premise of a “rights paradigm”, inherent to property law systems, which secures and tends to anchor “extant property holdings on the assumption that they are lawfully acquired, socially important and politically and morally legitimate” (viii). The author sums up the goal of his book as “to gauge the lasting power of the rights paradigm by investigating its effects in the margins of property law and of society” (viii). Focusing on the landowner’s rights to evict and exclude,